

# **MCR 2.403 CASE EVALUATION 2011-2012 CASE LAW UPDATE**

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## **I. INTRODUCTION**

This article reviews significant Michigan cases concerning MCR 2.403 case evaluation issued since January 2011.

## **II. MCR 2.403 CASE EVALUATION**

### **A. Michigan Supreme Court Decisions**

There do not appear to have been any Michigan Supreme Court decisions concerning case evaluation during the review period.

### **B. Michigan Court of Appeals Published Decisions**

#### **1. Extremely important required reading attorney fee case**

*Van Elslander v Thomas Sebold & Assocs, Inc*, \_\_\_ Mich App \_\_\_; 2012 WL 2470123 ( Docket No 301822) (June 28, 2012) (Talbot, O’Connell, and Sawyer), and *Smith v Khouri*, 481 Mich 519; 751 NW2d 472 (2008), should be carefully studied concerning attorney fee petitions, hourly rates, fee agreements, time sheets, and case evaluation.

The case evaluation portion of *Van Elslander* started with the April 2005 case evaluation of \$173,500 in favor of plaintiff Van Elslander. The plaintiff rejected this case evaluation. At trial there was a jury verdict of \$680,838.82 in favor of plaintiff.

The defendants appealed. The Court of Appeals reversed and remanded the case for a new trial. *Van Elslander v Thomas Sebold & Assocs, Inc*, unpublished opinion of the

Court of Appeals, issued December 2, 2008 (Doc No 272396 and 274966) (Schuette [dissent], Borrello, and Gleicher), lv den \_\_\_ Mich \_\_\_ (2008).

At the new trial, the jury rendered a verdict of no cause of action in favor of the defendants. The defendants then requested case evaluation costs. The Circuit Court awarded case evaluation costs of \$776,076.48 to defendants.

The plaintiff appealed the case evaluation costs award. Plaintiff argued that the issue tried on remand was not comparable to the issues originally submitted for case evaluation and that the favorable outcome that plaintiff obtained at the first trial should preclude an award of costs to defendants. The Court of Appeals affirmed the granting of costs.

The Court of Appeals exhaustively discussed the Circuit Court's rulings concerning recovery of (a) expert witness fees, (b) appeal bond costs, (c) transcript costs from the first trial, (d) deposition transcript costs, (e) deposition witness preparation costs, (f) non-dispositional motion fees, and (g) subpoena fees. The Court of Appeals remanded the case to the Circuit Court on some of these miscellaneous issues.

### **C. Michigan Court of Appeals Unpublished Decisions**

#### **1. Sometimes the first will be the last**

In *Shafer Redi-Mix, Inc v J Slagter & Son Constr Co*, unpublished opinion of the Court of Appeals, issued June 14, 2012 (Docket No 297765) (Borrello, O'Connell, and Talbot), defendants appealed the Circuit Court awarding them case evaluation costs of \$100,000 in costs. The case evaluation had been \$100,000 in favor of plaintiff. Plaintiff rejected the evaluation, recovered a verdict of \$107,781.51, and was liable for case evaluation costs. Defendants requested costs of \$199,000. The Circuit Court

awarded \$100,000. The Court of Appeals affirmed the Circuit Court's determination of \$100,000 costs rather than the higher amount requested by defendants. The Circuit Court considered *Wood v Detroit Automobile Inter-Ins Exch*, 413 Mich 573; 321 NW2d 653 (1982), and MRPC 1.5(a). Because costs are limited to a reasonable fee, it was appropriate for the Circuit Court to examine whether the extent of defense counsel's preparation was reasonable. According to the Circuit Court, there was too much lawyering, the preparation was overly thorough, and the number of hours was too great. The Court of Appeals considered whether the Circuit Court's decision was within the range of reasonable and principled outcomes. This case should be read in conjunction with *McDonnell v Colburn*, unpublished opinion of the Court of Appeals, issued October 21, 2010 (Docket No 292601) (Murphy, Beckering, and MJ Kelly), where the Court of Appeals held that the Circuit Court's denial of costs did not fall outside the range of principled outcomes.

## **2. Another attorney fee amount determination case**

*Ponte v Hazlett*, unpublished opinion of the Court of Appeals, issued April 24, 2012 (Docket No 298193 and 298194) (Hoesktra, Sawyer, and Saad). Plaintiff argued that the Circuit Court erred in awarding case evaluation costs that were not necessitated by plaintiff's rejection of the case evaluation. The Court of Appeals held that the Circuit Court abused its discretion in awarding attorney fees related to events that occurred before, and simultaneously with, plaintiff's rejection of the case evaluation, but properly exercised its discretion in awarding fees related to trial and defending against plaintiff's motion for a new trial because those fees were necessitated by plaintiff's rejection of case evaluation. The case was remanded for recalculation of the case evaluation costs. This

decision is important concerning measurement of case evaluation costs, hours included in fee calculation, importance of accurate time sheets, and allocation of attorney time.

**3. Effect of non-revealed to the court case evaluation acceptance**

In *Petz v Coffman Electrical Equip Co*, unpublished opinion of the Court of Appeals, issued January 17, 2012 (Docket No 301289) (Hoekstra, Markey, and Borrello), the Court of Appeals affirmed the Circuit Court setting aside a summary disposition order. The Circuit Court did not know that both parties had accepted case evaluation. The circumstances were extraordinary because the parties accepted the case evaluation weeks before the summary disposition order was entered. The dismissal based on acceptance of the evaluation had not yet been entered because payment does not have to occur for 28 days. MCR 2.403.

**4. Party should have raised case evaluation issue with arbitrator**

In *J J Judge Constr Services v Trinity Electric, Inc*, unpublished opinion of the Court of Appeals, issued August 2, 2011 (Docket No 295783) (Sawyer, Markey, and Fort Hood), after case evaluation, the parties agreed to arbitration. Defendants prevailed in arbitration so as to be arguably entitled to case evaluation costs. Instead of requesting these costs from the arbitrator, defendants requested them from the Circuit Court. The American Arbitration Association rules provided that the arbitration award may include attorney fees if authorized by law. Despite authority to grant attorney fees, the arbitrator held that the parties were to bear their own fees. According to the Court of Appeals, defendants should have submitted the attorney fee issue to the arbitrator.

**5. Effect of statutory interest on case evaluation**

*Berger v Katz*, unpublished opinion of the Court of Appeals, issued July 28, 2011 (Docket No 291663 and 293880) (Wilder [dissent], Saad and Donofrio), lv den \_\_\_ Mich \_\_\_ (2012). In this complicated case there was a unitary verdict, claims and counter-claims, and issues decided by the jury and issues decided by the judge. Plaintiffs appealed the Circuit Court's refusal to grant case evaluation costs. According to the Court of Appeals, the Circuit Court should have added the statutory interest figure to the jury verdict amounts. The Court of Appeals reversed the Circuit Court's order denying costs and remanded for a determination of costs. Judge Wilder's dissent would have affirmed the Circuit Court's denial of costs.

**6. Summary disposition reconsideration order extends time period**

In *Meemic Ins Co v DTE Energy Co*, unpublished opinion of the Court of Appeals, issued April 7, 2011 (Docket No 295232 and 296102) (O'Connell, K F Kelly, and Krause), lv den \_\_\_ Mich \_\_\_ (2011), defendants filed their motion for case evaluation costs 37 days after the entry of summary disposition, but only 16 days after the Circuit Court denied plaintiff's reconsideration motion. The Court of Appeals held that when a trial court has entered a summary disposition order that fully adjudicates the entire action, MCR 2.403(O)(8) requires a party to file and serve a case evaluation costs motion within 28 days after entry of a ruling on a motion for reconsideration of the order. The Court of Appeals reversed the Circuit Court's finding that defendants' case evaluation costs motions were untimely. The same outcome was reached in *Meemic Ins Co v Detroit Edison Co*, unpublished opinion of the Court of Appeals, issued March 17, 2011 (Docket No 295294) (O'Connell, K F Kelly, and Krause), lv den \_\_\_ Mich \_\_\_ (2011).

**7. Case evaluation costs properly ordered**

*Hall v Bartlett*, unpublished opinion of the Court of Appeals, issued March 29, 2011 (Docket No 288293, 290147) (Sawyer, Fitzgerald, and Saad), held that, because plaintiff was without fault, Oaklawn and Dr Bartlett were jointly and severally liable. MCL 600.6304(6)(a). Because the verdict was more favorable to plaintiff than the total case evaluation against Oaklawn and Dr Bartlett, plaintiff was entitled to costs. MCR 2.403(O)(4)(b). Even assuming arguendo that the non-economic damages cap should have been applied to the jury verdict, the verdict would still be more favorable to plaintiff than the total case evaluation against Oakland and Dr Bartlett. The non-economic damages cap was applied to the judgment. That number was more than ten percent higher than Oaklawn and Dr Bartlett's combined case evaluation figure. The Circuit Court properly awarded plaintiff case evaluation costs against Oaklawn.

**8. Summary disposition order does not stay or stop response period**

In *Estate Development Co v Oakland Co Rd Comm*, unpublished opinion of the Court of Appeals, issued March 24, 2011 (Docket No 291989, 292159, and 295968) (Murphy, Stephens, and MJ Kelly), app dis \_\_\_ Mich \_\_\_ (2011), plaintiff appealed the Circuit Court's denial of its motion seeking case evaluation costs. The situation was complicated by the history of the case concerning the dates associated with case evaluation, the date of the order granting defendant's summary disposition motion, and the later reversal of that ruling by the Court of Appeals. The issue was whether entry of the order granting defendant's summary disposition motion during the 28 day case evaluation response period excused Defendant from further participation in the case evaluation process and from having to make an acceptance-rejection decision before the

response period expired, such that defendant could not be sanctioned after plaintiff's claim was reinstated by the Court of Appeals and plaintiff obtained a more favorable verdict than the case evaluation. Defendant argued it did not have to respond to the case evaluation once the Circuit Court granted defendant's summary disposition motion. The Court of Appeals ruled that defendant's obligation to the case evaluation process still existed and that case evaluation costs could be awarded against defendant after there was an unfavorable verdict to defendant.

**9. Court of Appeals says panels operate with limited data**

Although *Jones v Beacon Harbor Homes, Inc*, unpublished opinion of the Court of Appeals, issued March 1, 2011 (Docket No 293789 and 294550) (Hoekstra, Fitzgerald [concur], and Beckering), did not directly concern case evaluation, the Court of Appeals commented that:

Both the trial court and plaintiff cite to the case evaluation award in favor of plaintiff as evidence that plaintiff's claims were meritorious. However, case evaluation panels operate with limited information and time; therefore, evidence of a case evaluation award does not persuasively establish that a claim was not frivolous.

**III. CONCLUSION**

Michigan appellate decisions since January 2011 concerned the following case evaluation issues.

1. Attorney fee calculation. *Van Elslander, Shafer Redi-Max, Inc*, and *Ponte*.
2. Timing of case evaluation. *Petz, Meemic Ins Co*, and *Estate Development Co*.
3. Arbitration and case evaluation. *J J Judge Constr Services*.

4. Interest. *Berger*.

### **About the Author**

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